Selection of Leading Cases

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LAW OF REAL PROPERTY

Supplementary Cases

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SELECTION OF LEADING CASES.

THE LAW OF REAL PROPERTY.

MIRZA KURRATULAIN BAHADUR

v.

PEARA SAHEB.

[*Reported in I. R. 32 I. A. 241 s.c. I. L. R. 33 Cal. 116 P.C. =9 C. W. N. 928.*]

The judgments of their Lordships was delivered by

P. C. 1905. July 5.

Sir Arthur Wilson.—This is an appeal from a judgment and decree of the High Court in Calcutta, dated August 6, 1903, which reversed the previous judgment and decree of the Subordinate Judge of the 24-Pergunnahs dated March 4, 1901.

The controversy between the parties relates to the estate of a Mahomedan lady known as Khas Mahal, who was the principal widow of the late ex-King of Oudh, and who died on April 1, 1894. About the facts which have to be considered there is no longer any controversy. The respondent, shortly known as Peara Saheb, was a distant relation of the ex-Queen. About the year 1881 he entered her service, in which he continued to the date of her death. He acquired her confidence in the highest degree, and became the head of her household and the manager of all her affairs. While occupying that position he received from her by way of gifts a large amount of property, in fact, substantially the whole of the property possessed by her which yielded any income.

On November 12, 1891, the lady executed a deed of release in the following terms:—

"I, of my free will and accord and without inducement and temptation exercised by any body, do declare that Nawab Peara Saheb, who is a near relation of mine, has pleased me with his good behaviour and services; and (his services) have afforded me much relief. The gift of things which I have from time to

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time made to him from the time of his connection with the management of my affairs down to the present time, have been made out of my natural affection for him and in recognition of his good and loyal services, and the cash and the things which I have given him have not been kept with him by way of deposit or trust or given as loan, and I and my heirs and representatives neither at present have, nor in future shall have, any right to get the same back or make demand for them. I further declare that the account of the cash and things and kind that up to the time of execution of this deed have been made over to him for my own personal use, is not to be considered or made up by him, and that I have kept with myself alone accounts and *taklid* of all kinds, and that I look after my *jemma kharch* (income and expenses) personally, and keep the account thereof with myself. The items which he has applied to his own use, or which are with him, are those very items which I have out of my affection for him and in recognition of his services given him and allowed him to make use of after due deliberation. If I or after me my heirs and representatives prefer claim or demand against him in respect of the gifts and accounts, and *taklid* and things and cash given, then it shall be considered null and void according to Shara (Mahomedan law) common usage and law. These words have therefore been written in the shape of a deed of release and acquittance and safiname, and after the completion of the necessary formalities delivered to him, so that it may serve him the purposes of an authority."

On June 20, 1893, the lady made her will, by which she appointed the Administrator-General of Bengal to be her executor if he should be willing to act, and if that officer should decline to act she appointed Peara Saheb.

In paragraph 2 she said:—

"I have from time to time made gifts of money and cash to the said Nawab Peara Saheb, and on the 12th day of November, 1891, I executed a safiname in his favour which has been duly registered. I have also by a deed of trust dated the 15th day of February, 1893, duly registered dedicated certain property therein described for religious and charitable purposes. I confirm those transactions."

The respondent's influence over the lady continued unabated down to her death, and there is no evidence that at any time during the course of her dealings with him she had the advantage of any separate and independent advice. From the evidence in this case he appears to have taken a prominent part in arranging the provisions of the will, and to have given instructions to the attorney who drafted it.

When the lady died she left surviving her as her sole heirs (according to the Shiah law by which the family was governed) two grandchildren. Their title as heirs was denied by the lady herself in her will, and after her death was persistently contested by those who were interested in denying that title. Their right of inheritance has, however, been finally established.

Soon after the death of the testator the Administrator-General, having been put in motion by Peara Saheb and acting under no indemnity from him, applied in the High Court for probate of the will. The grandchildren as heirs entered a caveat. Their right to appear as caveators was disputed, but was ultimately established.

The proceedings with reference to the probate then went forward, and on July 2, 1900, the learned judge who heard the case pronounced in favour of the will. The probate accordingly issued, dated August 30, 1900. It further appears that there was an appeal against that decision, and that the appeal was dismissed.

While the probate proceedings were pending, the present suit was instituted on March 26, 1897, in the Court of the Subordinate Judge of the 24-Pergunnahs. The plaintiffs were the two grandchildren of the testatrix and another person to whom they had assigned a portion of their interest. The first plaintiff is now represented by the first group of appellants, and the other plaintiffs are appellants. The defendants to the suit were Peara Saheb (respondent in this appeal) and the Administrator-General. The plaint stated the confidential relations which had existed between Peara Saheb and the lady, and alleged that Peara Saheb had misused his position of confidence, and thereby become possessed of the bulk of her property; and the material part of the prayer was to the effect

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Mirza Karatalaia Beboder v. Peara Saheb.

that Peara Saheb should be compelled to account for the property which had thus come into his hands, and should be declared to be a trustee for the plaintiffs. The written statement of Peara Saheb denied the case alleged in the plaint. Issues were settled of which it is only necessary to notice, for the present purpose, the 7th, 8th, and 9th:—

"7. Is the deed of release relied upon by defendant No. 1 genuine? Was the said defendant the confidential agent of, or in a fiduciary relation to, the late Khas Mahal as alleged in the plaint? Is the release had on the ground of undue influence? Is it a fact that any of the properties in suit were obtained by undue influence or while defendant was in a fiduciary relation from Khas Mahal? Does the release bar the present plaintiffs?

"8. Is defendant liable to render an account? If so, to what extent and in respect of what properties?

"9. What properties, if any, belonging to Khas Mahal deceased were removed or received by defendant No. 1 or otherwise came into his possession either with or without her consent, and is he liable to render an account in respect of the same or of any and, if so, for what portion thereof, and to restore any, if so, for what portion thereof?"

The Subordinate Judge delivered his judgment on March 4, 1901. He held that Peara Saheb had occupied a position of confidence, and had obtained the property in question by the exercise of undue influence, and that the alleged release was not genuine and not binding.

Before the time at which this judgment of the Subordinate Judge was delivered, the decision of the High Court establishing the will had been passed. It was necessary for him, therefore, to consider the effect of that decision upon the case before him. His view was that "the judgment of the High Court in the probate case conclusively proves that the Administrator-General is the executor under the will of Khas Mahal. It does not conclusively prove that all statements in the will are true." And he held that statements relating to the transactions with Peara Saheb and the release to him were not true. To the result he made a decree in favour of the plaintiffs.

On appeal to the High Court, that Court on August 6, 1903, held that the probate proceedings were conclusive of the questions arising in the present case.

The learned Judges said :—

"The will was strongly contested by the present plaintiffs Nos. 1 and 2 when probate was applied for by the Administrator-General of Bengal, and the probate proceedings were pending during the trial of the present case in the Court below, judgment being delivered on the 2nd of July, 1900, and probate issuing on the 30th of August in the same year. The decree now appealed against is dated the 4th of March, 1901. The Administrator-General of Bengal applied for probate on the 14th of May, 1894, and a caveat was entered by the plaintiffs Nos. 1 and 2 shortly afterwards. In the probate suit substantially the same issues were raised as in the present case. The caveators set up that Khas Mahal was physically and mentally incapable of giving instructions for the will or of understanding the will, that she was unable to understand the nature of the dispositions contained in the will by reason of her feebleness of body and mind, and that the will was prepared and executed under the undue influence of the defendant Pearu.

"Sale, J., sitting on the Original Side of the High Court held, however, that the caveators had absolutely failed to make out their case. He was satisfied that the lady did give instructions for her will, that she thoroughly understood its contents and executed it as a free agent, and not under the influence or domination of Pearu, and with full testamentary capacity, and probate was accordingly granted. The present plaintiffs Nos. 1 and 2 appealed against that decision, but the appeal was dismissed with costs. There was no further appeal from that decision.

"We must take it, then, for the purpose of the present discussion, that the lady thoroughly understood the purport and effect of her will and that it was her voluntary act, and that she was of full testamentary capacity to make the will, and in that will she expressly confirms this release."

They therefore reversed the decision of the First Court, and dismissed the suit with costs. Against that decision of the High Court the present appeal has been brought.

P. C. 1905.

Mirza Kerratulain Bahadur v. Peara Saheb.

In the course of the argument before their Lordships the questions for decision became greatly simplified. It was admitted on behalf of the respondent that, apart from the will, the release and the other transactions between Peara Saheb and the lady could not have been supported. It was not disputed—indeed it could hardly have been disputed—that, upon the evidence in the present case and apart from the alleged effect of the probate and the proceedings which led up to it, the respondent could not have relied upon the confirmation of the earlier transactions contained in the will. The appeal was resisted solely upon the legal ground that the appellants are estopped by the probate, or by the proceedings which led to the issue of the probate, from denying the validity of the confirmation which the will purports to contain of the transactions between Peara Saheb and the testatrix during her lifetime, and particularly of the release alleged to have been executed by her. The correctness of that contention is what their Lordships have to consider.

The estoppel was rested upon two distinct grounds which must be considered separately. First, it was said that the matters now in question were *res judicata* under s. 13 of the Civil Procedure Code; and, if their Lordships rightly understood the case, that is the ground upon which the learned Judges in the High Court disposed of the case. Sect. 13 enacts that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title . . . . and has been heard and finally decided by such Court."

It was contended that the probate proceedings were opposed as caveators by the first and second original plaintiffs, of whom the second is now an appellant, while the first is represented by the first group of appellants, and the third plaintiff-appellant claims under the others; that in those proceedings the questions were at issue whether the will had been executed under undue influence, whether that will represented in its entirety the free and independent intention of the testatrix, and therefore whether the confirmation which it purports to

contain of the previous gifts and release was a valid testamentary disposition.

Several objections have been raised to the estoppel so set up.

First, such an estoppel can only arise from a decision in a former suit between the same parties, and it is contended that in the present instance this condition is not fulfilled. The former proceedings were between the Administrator-General, who propounded the will, and the present appellants or those whom they represent, though it is true that the Administrator-General was set in motion by the present respondent and acted under his indemnity. For reasons which will be stated their Lordships think it unnecessary to consider this point.

Secondly, to give rise to an estoppel not only must the former suit have been between the same parties as the latter; it must also have raised the same issues. It was argued for the appellants that assuming the issues raised in the probate proceedings to have been precisely what the High Court in the present case understood them to have been, the issues in the present case were not the same, because in the present case, in order to validate the confirmation by the will of the release and other transactions, it was necessary to show, not only that the testatrix knew and intended what she purported to do by her will, but also knew what her actual rights were in respect to that release and those transactions, and knew them to be invalid and not binding upon her—a matter which it was said did not and could not arise in the probate proceedings. This seems to present a serious difficulty in the way of the respondent.

But their Lordships think that the contention of the respondent under s. 13 fails upon another and a simpler ground. The respondent is relying upon a bare legal difficulty to resist a case to which there is no substantial answer on the merits. He says that the questions now in issue were formerly in issue in the probate proceedings. How can their Lordships tell that? Those proceedings are not in evidence, as they ought to have been in order to support such a case. There is a petition for probate and the probate itself. There is mention of a caveat and of an affidavit in support of it. There are two judgments delivered at different stages, and there is mention

I. C. 1905

Mirza Kurratulain Haidar v. Peara Sahib

of a decree on appeal. [illegible] judgment of the court below shows clearly enough what we understand to be the questions for decision but that is not enough. These last steps cannot be subject to the [illegible] for which they can say for themselves - that the matters now in some way or issue in the [illegible] proceedings. Whether any issues were settled at those proceedings or what matters ought were otherwise formulated does not appear on both the face of such decrees or orders made thereon. [illegible] therefore, think that the alleged estoppel cannot be held [illegible] of the absence of the probate proceedings there is [illegible] to support it.

The second ground of estoppel rests not upon the probate proceedings or any issues raised upon [illegible] of them but upon the effect of the probate itself. [illegible] to a question of status [illegible] and for the purpose of determining it it seems to me of no consequence whether probate has been granted [illegible] or after opposition.

The position thus accurately [illegible] the terms of the Probate and Administration Act V of 1881. Sect. 1 of that Act says that "the executor or executors, as the case may be, of a deceased person is the legal representative of all purposes and all the property of the deceased person vests in him as such."

Sect. 89 gives to the executor or administrator power to sue in respect of causes of action that survive the deceased and to recover debts [illegible] but not [illegible] powers of suit [illegible] probate when granted establish the will [illegible] testator and s. 59 says that—

Probate [illegible] shall have effect over all the property [illegible] vested in the deceased [illegible] and shall render valid [illegible] the executor all [illegible] debts of the deceased and all [illegible] belonging to him at the time of his death and debts payable to any person deriving any right [illegible] to the power to sell such property [illegible] and in all cases shall have been granted

J. C.
1905
Musa Karmalain Bahadur v. Poera Bahab.

The title thus conferred upon every executor who has obtained probate is obviously convenient as tending to facilitate the administration of the estate of the deceased and the adjustment of the rights of all parties connected with it. But in the case of every Mahomedan will it establishes a somewhat peculiar state of things.

A Mahomedan testator has not an unlimited power of disposition by will. He can only deal with one-third of his property, the remaining two-thirds pass to his heirs whatever the terms of his will may be. Thus the executor, when he has realized the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts one is created by the Act and the probate irrespective of the will, the other by the will established by the probate. There are thus two trusts for different sets of persons of different properties and based upon different titles. And this state of things does not arise from any accidental conflict of laws such as gave rise to a somewhat similar complication in the case of *Fowke* v. *Gooch*,[1] but by the deliberate action of the Legislature. In giving effect to a system of so peculiar a nature as that described their Lordships think it necessary to proceed with great caution.

The Act in question applies only to persons to whom the Indian Succession Act X of 1865 did not extend—that is to say, Hindus, Mahomedans and Buddhists. And, though the sections relating to probate, the Probate and Administration Act are substantially taken from the corresponding sections in the Succession Act, it must be observed that the last-mentioned Act, while to a large extent embodying the rules of the English law, yet departed in many particulars from those rules, and was not only made applicable to persons of European descent, or those to whom the system derived from the Ecclesiastical Courts might not unfairly be applied, but was made the law for all persons in British India other than Hindus, Mahomedans and Buddhists, including, for instance, the Parsees, who form so important a part of the community in some districts of India.

[1] 11 App. Cas. 541.

J. C. 1911

Mirza Ameer Hussain Beharee v. Pearu Sahoo

To take away probate was first given to the Supreme Courts by [illegible] Bengal Act in 1774 [illegible]. And it was given as a branch of ecclesiastical jurisdiction, and was to be granted according to the ecclesiastical law as in force in the Diocese of London. In the course of the series of events by which the British territories in India grew from a group of trading settlements at Madras, Bombay and Calcutta, whose sparing organs for administering justice have come to be supplied by a number of legislative acts to new territories and new classes of persons and administered by new tribunals. And in the progress of this development the original origin of such jurisdiction has been completely obscured and the Legislature has gradually evolved a coherent system of its own, largely suggested no doubt by English law but also differing much from that law and purporting to be a self-contained system. Even in the case of the High Courts the successors of the Supreme Courts, which alone exercised ecclesiastical jurisdiction, the testamentary jurisdiction which the statutes purport to confer upon them is not given as a branch of ecclesiastical jurisdiction and is not made dependent upon the law administered by English Courts.

From an early date the Supreme Courts granted probates of Hindu and Mahomedan wills. The practice varied greatly from time to time and it was never perhaps very satisfactorily determined what laws the jurisdiction created. It was, however, established that such probates might issue. But the Supreme Courts never applied the English rule as to the necessity for probate to Hindu or Mahomedan wills, nor did they attribute to such probates when granted the English doctrines as to the operation of probate. Under that system a Hindu or Mahomedan executor took no title to property merely as such by virtue of the probate. In the case of Mahomedan executors even a title was created for the first time by the Probate and Administration Act.

I have considered it necessary to set [illegible] strong to show that the effect of a grant of a Mahomedan will granted after

[illegible]

[illegible] Reports, and p. 113

the Probate and [illegible] Act [illegible] that [illegible] given [illegible] of [illegible] Act itself, neither more nor less. What, then [illegible] the Act? Sec. [illegible], supplemented by [illegible] vests [illegible] the executor [illegible] makes [illegible] representative [illegible] debtors of the deceased and persons holding [illegible] and gives a complete indemnity to those who [illegible] up property to the executor holding the probate. These enactments appear to their Lordships [illegible] to the probate in the present case [illegible] not [illegible] they shew that [illegible] of the estate [illegible] for them [illegible] or possessed of property [illegible] the will, nor do they [illegible] will as a [illegible] claiming under it, of that part of the [illegible] which she could dispose of by will. [illegible] are entitled [illegible] testatrix [illegible] life-time. It [illegible] admitted [illegible] for the [illegible] the [illegible] of Peara Saheb was in the disposition of the testatrix at the time of her death. [illegible] of more than one-third [illegible] of the [illegible] could not confirm Peara Saheb's title in more than that one-third and the [illegible] other two-thirds. The controversy is between the heirs claiming adversely to the will and a person who claims a beneficial interest under the will and [illegible] of the Act which have been [illegible] create no estoppel in such a case. [illegible] with the learned judges of the High Court [illegible] and ought to be dismissed.

It remains to consider what the decree [illegible]

The [illegible] after [illegible] with reference to the lady, went on to state that he [illegible] from her jewellery [illegible] the latter statement was naturally made only in general terms.

P. C.
1886.
Mirza Kurratulain v. Nawab

Peara Saheb.

J. C.
1903
Mirza Kurramdam
Beharry
v.
Peara Saheb.

The written statement admitted the receipt of jewellery which realized Rs. 30,000 or thereabouts, and of sums of money the amount of which was not given, but said to have been invested in "Government of France promissory notes." The mode of the issues settled for trial raised the question of how much the respondent had received and ought to account for. At the trial these questions of amount were fully gone into, and the respondent, who was examined, had every opportunity to show what he had received and what he had done with it and to prove, if it were possible, any credits which ought to have been allowed to him on the other side of the account. He could give no satisfactory account of what he had done with the moneys received by him, as of the transactions between him and the testatrix, nor did he assert that any credits should be given to him, so that at the trial the account was taken as far as it was possible to take it, and it was shown that no further account could be obtained. The Subordinate Judge held that it would be idle to direct any further account to be taken, and gave a decree against the respondent for the amounts of which he admitted the receipt, with interest.

In the course of the argument before their Lordships the learned counsel for the appellants admitted that his clients were interested in the estate to the extent of two-thirds only, and intimated that they would be content with a decree upon this footing.

Their Lordships are satisfied that no injustice can have been done by the Subordinate Judge by reason of the principle upon which he proceeded in framing his decree, but they think, for the reason just stated, that the present appellants can claim only two-thirds of the amount awarded by the first Court.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside with costs, and the decree of the Subordinate Judge affirmed, with the modification that the amount awarded to the appellants be reduced by one-third, and that any alteration which this may entail in the amount of costs ordered be made.

The respondent will pay the costs of this appeal.

Solicitor for appellants: *W. H. Hoe.*

Solicitors for respondent: *[illegible]*

SUIT

Besides the [illegible] the [illegible] the testamentary [illegible] present may [illegible] have also been [illegible] Act (X of 1865) and the Probate and Administration Act (V of 1881) [illegible] interpretation of Sec. 4, [illegible] of Probate and Administration Act. The [illegible] the [illegible] but where [illegible] for the [illegible] and holds [illegible] of Testamentary [illegible] Rep. [illegible] C. L. J. 62—Ed.

SAILAJA PROSAD CHATTERJEE AND OTHERS

v.

JADU NATH BOSE.

[On Appeal from the High Court, Calcutta.]

The Judgment of the Court was delivered by

1914. May 13.

Mookerjee, J.—This appeal arises in some of the defendants in a suit to enforce a mortgage security. The substantial question for consideration between the parties is whether the mortgage is operative upon the property now in the hands of the appellants. The circumstances under which the mortgage was created are set out in detail at the stage and may be briefly stated. The property in suit is part of the estate of one Durgadas Chatterjee who made a testamentary disposition on the 6th April 1885. The testator died in 1888 and on the 5th December of that year probate was granted to the eldest son Annada Prasad Chatterjee who was named as the executor in the will and figures as the first defendant in this litigation. On the 6th February, 1891 the widow of the testator and one of his grandsons who are the second and third defendants respectively in this suit applied to the probate Court for removal of the executor on the ground of his misconduct and for revocation of the probate issued to him. On the 19th July, 1894, the probate was revoked and the appointment of the first defendant as executor was cancelled. On the 14th August 1894 the probate Court appointed the widow and the grandson as joint administrators and four days later issued to them letters of administration (hereinafter referred to in the order sheet as 'probate') with copy of the will annexed. On the 10th September 1894 the executor whose appointment had been revoked lodged an appeal in this Court against the order of the District Judge. On the 31st January 1896, the appeal was allowed and the order of the District Judge reversed on the ground that the alleged misconduct and mismanagement did not constitute a just cause for removal of an executor under clause 4 of section 32 of the Probate and Administration Act (Act V of 1881). Thereupon the probate

[1] (1896) I. L. R. 24 Calc. 95

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Jado Nath.

original [illegible] was ordered to be [illegible] 11th Feb. ruary 1897 [illegible] the 11th February 1897. Meanwhile, on the 20th April, 1895, in execution of a decree for [illegible] against the executor the disputed property was [illegible] by [illegible] that Chattergee now [illegible]. The decree had been obtained by a [illegible] of the estate to a suit for [illegible] of arrears of revenue payable to Government by all the [illegible]. The [illegible] who were in possession of [illegible] and [illegible] appeal to the District Judge on the 6th May 1896 [illegible] to raise money by mortgage of [illegible] which were to have the sale set aside under section [illegible] of the Civil Procedure Code of 1882. [illegible] and the value of their settlement was [illegible] which the property was worth in which Rs. [illegible] was due [illegible] which had been paid [illegible] Rs. 1[illegible] and [illegible] would result [illegible]. The District Judge [illegible] the mortgage and [illegible] which would thereby [illegible] by way of [illegible]. The plaintiff thereupon [illegible] Rs. [illegible] the [illegible] who opposed the motion [illegible] of the [illegible] 1st May, 1897, [illegible] in his favour the mortgage now sought to be enforced, by which [illegible] the [illegible] the 17th April, 1896. On the 21st April, 1898, i.e., after the executor had been [illegible] the [illegible] of the appeal to this Court, the disputed property was [illegible] of a money decree against [illegible] and was purchased by [illegible] who subsequently transferred the same to [illegible] the present appellants on the 24th December [illegible]. On the 9th April, 1903, the plaintiff commenced [illegible] to enforce his security and he [illegible] the present [illegible] namely the executor as the [illegible], the administrator [illegible] and [illegible] defendants and the representative [illegible] purchaser as the remaining defendants. The [illegible] contested by the last-named defendants only [illegible] that the mortgage was inoperative, because granted by [illegible]

1916
Sadaja Prasad
v.
Jadu Nath

appointed as such. The Courts below have concurrently overruled this defence, and have decreed the suit. On the present appeal the decree of the District Judge has been challenged on two grounds, namely, *first*, that the mortgage granted by the administrators does not bind the estate, and, *secondly*, that as the provision for payment of compound interest at a high rate was not sanctioned by the District Judge, the claim for interest cannot be sustained.

The first point taken on behalf of the appellants raises the question of the effect of revocation of a probate or letters of administration, upon which there has been some divergence of judicial opinion. The effect of revocation of a grant of probate or letters of administration has been made to depend mainly upon whether the grant was void *ab initio* or merely voidable. In *Hewson v. Shelley*[1] it was decided that where administration is granted on concealment of a will which appointed executors, the grant is void from its commencement and all acts performed by the administrators in that character are equally void and cannot be made good even though the executor should afterwards appear and renounce. But in *Pickering's Case*[2] it was held that if the administrator had paid funeral expenses, debts or legacies which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup as much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, for as much as he himself would have been bound to pay it. Again, from *Crossbrook v. Fox*[3] it appears that in an action by the true executor against the purchaser of goods sold to him by the administrator, the sale is indefeasible, if made to discharge the funeral expenses or the debts which the administrator or executor was compellable to pay. Where, however, the act in question is one which the administrator was not compellable to do, but is a voluntary act on his part, it has been sometimes said that it is simply void and no title is thereby conferred on a purchaser, *Hewson v. Shelley*[1] or mortgagee [*Ellis v. Ellis*[4]] from him, and the vendor is also liable in damages in an action by the

[1] (1877) 2 Lee 181.
[2] (1662) 1 Powell 20.
[3] (1560) cited in Plowden 359.
[4] (1917) W. N. 240.
[5] (1665) 1 Ch. 618.

1914

Ratings Record

Judy North

Mr. [illegible] J

tive executor. *H[illegible]* v. *Ward*.[1] In *Bu[illegible]* v. *Ha[illegible]* it was held that where the testatrix had appointed an executor for the repealed grant limited by a revoking the will is not void *ab initio* and therefore a letter of administration was held to be a valid transaction. It is wherever the grant of administration is voidable only, as where the grant is made in ignorance of the existence of a will, or the executor has renounced, and the Court not knowing it, or in fact some strong reason to the contrary, or without calling the necessary parties, all such acts done by the first administrator are deemed valid as against the subsequent administrator: *Putnam's Case*[2]; *Hackthorpe* v. *Jones*.[3]

It is worthy of note that the earlier cases to which we have referred were overruled by Lord Hardwicke in *Jones* v. *Jones*[4] and a view more favourable to the grantee of the executor for value without notice has been taken in modern decisions to which we shall now refer. [illegible] v. *Jones*, *Wms. on Executors*, where the Judicial Committee affirmed the decision of the majority in *Jones* v. *Lewis* v. *Thomas*, *Executor*. Lord Macnaghten observed that so long as the letters of administration remained unrevoked the person in whose favour the grant had been made was fully entitled and purported administrator and any payments made and charges for all purposes incurred by him as such administrator. The real significance of the decision was appreciated when it is borne in mind that the effect of the administration had been obtained by fraud and by suppression of the fact that the executor had a will. A similar view has been expressed recently by Warrington, J., in *Gopal Das* v. *Rukmee Bai*[5] which may be difficult to reconcile with the decision in *Pingong* v. [illegible], and was subsequently adopted by Neville, J., in *Crozier* v. *Thomas*.[6] It will be observed that in the case last mentioned the administration had been granted notwithstanding the existence of a will which had been kept back from the Court, and it was thus possible to assert which might be argued with plausibility

(1852) [illegible]
23 L. R. 540.

[1] (1854) 27 Ch. D. [illegible]

[2] [illegible] 56

[3] [illegible]

[4] [illegible]

[5] (1905) L. R. A. 101
L. L. R. 30 Calc. 927.

[6] (1906) L. L. R. 33 Calc. [illegible]

[7] (1906) L. L. R. 33 Calc. [illegible]

[8] (1906) 10 C. W. N. 797.

[9] (1906) 2 Ch. 344.

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that the grant was void ... yet the Court held that the grant was voidable and not void. Consequently if the view is maintained that a grant of probate obtained by an incompetent Court though erroneously is voidable, that is equivalent to if it has been revoked by that Court or set aside by a superior tribunal. There is no room for controversy that the mortgage ... was a charge upon the estate. But even if we take a more restricted view, namely that adopted by Walsh, J. in *Gopal v. Ram*, the mortgage is clearly indefensible because it was created to satisfy a debt of the estate which the executor himself was compellable to pay. The executor had failed to pay the decree-debt which had thereupon been attached by one of the creditors of the estate. The executor brought a suit to substitute the present petitioner who was consequently constrained to sue and to obtain a decree. Even then the executor failed to satisfy the judgment-debt. Execution followed with the result that a valuable property was sold for an inadequate price. Under these circumstances, the administrators with the sanction of the District Judge, raised a loan and saved the property which it was their paramount duty to do. This borrowing to avoid what it would have been obviously incumbent upon the executor to do for the protection of the estate if he had been in possession at the time and we are unable to discover any conceivable principle of justice, equity and good conscience to support the contention that the mortgage was of no avail, because granted by administrators erroneously appointed by the probate Court. It may be added that the more liberal view in estate matters has been accepted in the American Courts, where it has been ruled that all acts done by an executor or administrator in the due and legal course of administration are valid and binding, even though the letters issued by the Court are afterwards revoked or the incumbent discharged from the trust *Hegeman v. Hegeman*[1], *Foster v. Brown*[2], *Baker v. Rose*[3]. Reference has been made to a dictum in *Hall v. Hall*[4] that a grant is reversed

[1] (1862) 1 Flowden 278.
[2] (1829) 19 Am. Dec. 501, 6 Ohio 139.
[3] (1828) 19 Am. Dec. 652, 1 Bailey Eq. 54.
[4] (1837) 33 Am. Dec. 227, 8 Leigh (Va.) 119.
[5] (1884) 27 Ch. D. 220 (241).

by a Court of appeal it must be deemed void *ab initio*, though revocation takes effect only from the time of the recall, and it has been argued that all intermediate acts of the executor or administrator pending an appeal which results in a reversal of the former sentence, are void, because, it is said on the strength of the dictum in *Price* v. *Parker*,[1] the appeal suspends the operation of the sentence, which on its reversal places all the parties in the position which they would have occupied if it had never existed. This contention does not appear to be well-founded on principle, and cannot, at any rate, be applied to the Indian system of law which explicitly recognises the doctrine that an appeal does not operate as a stay of proceedings under the decree or order challenged by way of appeal (Order 41, Rule 5, of the Civil Procedure Code, 1908). It is worthy of remark that in the Courts of the United States, although in some cases [*State* v. *William*[2]; *Muirhead* v. *Muirhead*[3]] the view has been maintained that an appeal suspends the operation of a decree and leaves the executor or administrator in office as before, there is respectable authority for the contrary opinion that an appeal by an executor from an order revoking probate of the will does not continue the powers of the executor pending the appeal: *Horney* v. *Scott*[4]; *Crozier's Estate*,[5] In *re Hood*.[6] But the appellants are in a further difficulty in the present case. The executor was actually removed and the administrators were placed in possession long before the appeal was preferred; consequently, there is no room for the application of the doctrine that the appeal suspended the operation of the order for revocation. We may add that in systems where the view is maintained that an appeal against an order of revocation, suspends the operation of the order, practical difficulty in the management of the estate is avoided by the appointment of an administrator *pendente lite*, and plainly no question could arise as to the legality of the mortgage in suit, if the administrators here are deemed to have been in essence at least administrators *pendente lite*. We need not, however, have recourse to what might be called a fiction and, for the reasons previously assigned, we hold that the mortgage granted by the

[1] (1641) 1 Lev. 157.
[2] (1850) 9 Gill. 172.
[3] (1847) 8 Sm. and M. 211.
[4] (1859) 38 Mo. 335.
[5] (1884) 65 Cal. 332; 4 Pac. 169.
[6] (1903) 35 Atl. 290.

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administrators with the sanction of the probate Court bound the estate.

The second point taken on behalf of the appellants raises the question of the validity of the claim for interest. In the application to the District Judge for sanction of the proposed mortgage, the principal amount required to be raised was stated as Rs. 550, but no mention was made about interest. When the deed was executed by the administrators, they covenanted, however, to pay compound interest at 30 per cent. per annum with half-yearly rests. Under Section 90 of the Probate and Administration Act, an administrator is authorised to grant a mortgage of the immovable property vested in him, only with the previous permission of the probate Court. This implies a sanction by the Court of all the essential elements of the mortgage transaction, and there is no room for doubt that, from the point of view of the burden imposed on the estate, the provision for payment of interest may be even more effective than the principal amount of the loan required to be raised. See *Ganga Prashad Saha* v. *Mahaveni Bibi* [1]; *Thakur Prasad* v. *Gauripat Rai* [2] which arose on the corresponding provisions of the Guardians and Wards Act, XL of 1858, Section 18 and VIII of 1890, Section 29. See also *Akhiram Pal* v. *Mukunda Lal Dutt*,[3] *Rai Radha Kissen* v. *Nawalan Lall*,[4] *Nimai Chand Addya* v. *Golam Hosein*.[5] In the case before us, the clause for the payment of compound interest at a high rate was manifestly unreasonable, and the lender obviously made the best of the embarrassing situation in which the administrators found themselves. We accordingly reduce the interest to simple interest at 9 per cent. per annum and we do so partly in view of the fact that the mortgagee has waited till very nearly the last day of the period of limitation, clearly with the object that the claim for interest may reach the maximum possible amount. Such interest as we allow is recoverable from the date of the mortgage and must be added to the mortgage money as was

[1] (1894) L. R. 22 I. A. 47; I. L. R. 21 Calc. 379.
[2] (1908) I. L. R. 30 All. 188.
[3] (1906) 4 C. L. J. 542 (548).
[4] (1907) 6 C. L. J. 490 (521).
[5] (1909) I. L. R. 37 Calc. 170; 13 C. L. J. 317.

done by the Judicial Committee in *Chajjmal* v. *Brij Bhukan*.[1] The decision in *Moti* v. *Ramakarai*[2] is clearly distinguishable, as there was no covenant at all for payment of interest *post diem* in that case, and the amount allowed, though added to the mortgage dues, was treated as damages, a distinction not always recognised: *Gadillo* v. *Wegnelin*.[3]

The result is that this appeal is allowed in part, the decree of the District Judge discharged, and, in lieu thereof, the usual mortgage decree made in favour of the plaintiff for Rs. 1,502-14-0, namely, Rs. 550 as principal and Rs. 952-14-0 as interest thereon at 9 per cent. per annum from the 21st May, 1895, to the 21st August, 1914, which we fix as the date for redemption. The plaintiff will also be allowed his costs in the Court of first instance on the sum now decreed, such costs to be ascertained in this Court and added to the mortgage dues. If the decretal amount is not paid on or before the 21st August, 1914, it will carry interest at 6 per cent. per annum from that date and the mortgaged property will be sold in due course for realisation thereof. The defendants will not be personally liable for any portion of the decretal amount. Each party will pay his own costs of the appeal to the District Judge as also of the appeal to this Court.

We are informed that the mortgaged property has been sold in execution of the decree now set aside and has been purchased by the decree-holder. The effect of our order will be that the sale will stand annulled from this date, and the property will be re-sold, if occasion arises, in execution of the decree now made: *Sri Chandmal* v. *Srinath Ray*[4]; *Chandan Singh* v. *Rawleni Singh*.[5] We do not, however, now determine what restitution the decree-holder may be liable to make, if he took possession of the property by virtue of his purchase at the sale now cancelled; that question must be determined by the execution Court if an appropriate application is made in that behalf by the party interested: *Raghu Singh* v. *Sheo Pershad*[6]; *Beni Madhe Singh* v. *Pran Singh*.[7]

Appeal allowed in part.

[1] (1895) L. R. 22 I. A. 190; I. L. R. 17 All. 511.
[2] (1887) I. L. R. 24 Calc. 698.
[3] (1877) 5 Ch. D. 285.
[4] (1900) I. L. R. 27 Calc. 819.
[5] (1904) I. L. R. 31 Calc. 999.
[6] (1912) 16 C. L. J. 135.
[7] (1911) 15 C. L. J. 167.

NOTE.

There is a good deal of difference of judicial opinion on the question what is the effect of revocation of a probate or Letters of Administration. On the review of many cases on this subject it has been held in this case that all acts done by an executor or an administrator in the due course of administration are valid and binding, even though the probate or the letters issued by the Court are afterward revoked. Section 90 of the Probate and Administration Act is very important. The sanction of Court under Section 90 of the Probate and Administration Act implies a sanction by the Court of all the essential elements of the mortgage transaction, and from the point of view of the burden imposed on the estate, the provision for payment of interest may be even more effective than the principal amount of the loan required to be raised.